Office-Supreme Court, U.S.
FILED
SEP 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1577

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEE

PHILIP W. TONE
One IBM Plaza
Suite 4500
Chicago, Illinois 60611
(312) 222-9350

LOUIS P. BICKEL
THOMAS L. CASE
5441 First International Building
Dallas, Texas 75270
(214) 651-8545

Of Counsel:
DON R. SAMPEN
CHRISTOPHER L. VARNER
SIDNEY I. SCHENKIER
RICHARD P. STEINKEN
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6981

Statement Pursuant to Supreme Court Rule 28.1.

Aladdin's Castle, Inc. is the wholly owned subsidiary of Bally Manufacturing Corporation. The only subsidiary of Alladin's that is not wholly owned is American Amusements of Arkansas, Inc. Aladdin's has no affiliates other than as stated herein.

QUESTIONS PRESENTED FOR REVIEW

The Age Restriction Claim

1. Whether 28 U.S.C. § 1254(2) confers upon this Court jurisdiction of the age restriction claim notwithstanding the existence of independent and adequate state law bases for the Court of Appeals' judgment on that claim, and, if not, whether the Court, treating the jurisdictional statement as a petition for certiorari, should deny certiorari.

2. Whether, if this Court exercises its certiorari jurisdiction to consider the age restriction claim, the judgment should be affirmed on one or more of the following Texas law grounds:

(a) The age restriction violates the equal protection guarantee of the Texas Constitution by drawing an unreasonable distinction between coin-operated amusement centers, which are subject to the age restriction, and other amusement establishments, which are not.

(b) The age restriction violates the due process clause of the Texas Constitution by arbitrarily denying Appellee the use of its leasehold interest and the chattels therein.

(c) The age restriction is a prohibitive regulation in violation of the Texas Constitution.

(d) The City of Mesquite, by its conduct, is equitably estopped under Texas law to enforce the age restriction against Appellee.

3. Whether the classifications made by the age restriction provisions are invidious and irrational and thus violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

4. Whether the age restriction infringes, without compelling reason, the fundamental rights of expression and association, and therefore violates both the First Amendment and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The Licensing Claim

5. Whether the licensing standard of "connections with criminal elements," even with its accompanying definition, is void for vagueness.

6. Whether Mesquite's repeal of the "connections with criminal elements" language, though voluntary, nonetheless renders the vagueness claim moot.

7. Whether the Court, in order to do justice in this case, should dismiss the appeal, but permit the judgment to stand, if it finds the vagueness claim moot.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

CONSTITUTIONAL AND STATUTORY PROVISIONS CONSTRUED xv

STATEMENT OF THE CASE 1

Course of Proceedings Below 1

Statement of Facts 2

Background of Aladdin's 2

Negotiations in Mesquite 3

Mesquite's Denial of the License 4

State Court Proceedings 5

Ordinance No. 1353 6

The Pending Litigation 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. AS TO THE AGE RESTRICTION CLAIM, THIS COURT SHOULD DISMISS THE APPEAL AND DENY CERTIORARI, BUT, IF THE MERITS ARE REACHED, THE JUDGMENT SHOULD BE AFFIRMED ON STATE LAW GROUNDS 10

PAGE

A. Because The Judgment Is Supported By Independent And Adequate State Law Grounds, This Court Lacks Appellate Jurisdiction Under 28 U.S.C. § 1254(2). Treating The Jurisdictional Statement As A Petition For Certiorari, The Court Should Deny Certiorari 10

B. The Age Restriction Is Invalid Under Texas Law 14

1. THE AGE RESTRICTION VIOLATES THE TEXAS CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS 14

(a) *Equal Protection* 15

(b) *Due Process* 16

2. BECAUSE THE AGE RESTRICTION MAKES IT IMPOSSIBLE FOR ALADDIN'S TO CONTINUE PROFITABLE OPERATION, IT VIOLATES WELL-ESTABLISHED TEXAS LAW FORBIDDING MUNICIPALITIES FROM ENACTING PROHIBITIVE REGULATIONS. IN ADDITION, MESQUITE IS EQUITABLY ESTOPPED FROM ENFORCING THE RESTRICTION 18

(a) *Prohibitive Regulation* 18

(b) *Equitable Estoppel* 20

II. THE AGE RESTRICTION VIOLATES RIGHTS PROTECTED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT 22

A. The Provision Bears No Rational Relationship To A Legitimate State Purpose 22

PAGE

B. Ordinance No. 1353 Abridges The Fundamental Rights Of Expression And Association, And Cannot Be Justified Under The Strict Scrutiny Test 29

1. The Right of Expression 30

2. The Right of Association 34

3. Regulation of Minors 36

4. Strict Scrutiny 39

III. ORDINANCE NO. 1353's "CONNECTIONS WITH CRIMINAL ELEMENTS" LICENSING STANDARD IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 39

A. The Passage Of Ordinance No. 1410 Does Not Render This Appeal Moot, As The City's Action Is Merely A Voluntary Cessation Of The Impermissible Conduct 39

B. The Phrase "Connections With Criminal Elements," Even With Its Accompanying Definition, Is So Imprecise And Capable Of Varying Interpretation As To Be Void For Vagueness 42

C. Even If The Court Deems The Vagueness Issue Moot, The Judgment Should Be Left Intact As To That Issue 48

PAGE

CONCLUSION 49

APPENDIX

City of Mesquite Ordinance No. 1410 (1977) A1

TABLE OF AUTHORITIES

PAGE

CASES

A. B. Small Co. v. *American Sugar Refining Co.*, 267 U.S. 233 (1925) 43

Aladdin's Castle, Inc. v. *City of Mesquite*, 630 F.2d 1029 (5th Cir. 1980) ..... *passim*

Aladdin's Castle, Inc. v. *City of Mesquite*, 434 F.Supp. 473 (N.D. Tex. 1977) ..... *passim*

Alpha Enterprises, Inc. v. *City of Houston*, 411 S.W.2d 417 (Tex. Civ. App.), *cert. denied*, 389 U.S. 1005 (1967) 18

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 13

Bates v. *City of Little Rock*, 361 U.S. 516 (1960) 36

Bellotti v. *Baird*, 443 U.S. 622 (1979) 37

Berry v. *City of Fort Worth*, 132 Tex. 599, 124 S.W.2d 842 (1939) 18

Bielecki v. *City of Port Arthur*, 12 S.W.2d 976 (Tex. Com. App. 1929) 17

Board of Regents v. *New Left Education Project*, 414 U.S. 807 (1973) 48

Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 47

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 13

Carey v. *Population Services International*, 431 U.S. 678 (1977) 29

PAGE

Cinematronics, Inc. v. *Shapiro*, No. Civ. 81-328 (D.Ariz. April 17, 1981) 32

City of Cuero v. *Tupper-Texas, Inc.*, 226 F.2d 121 (5th Cir. 1955) 20-21

City of Dallas v. *Rosenthal*, 239 S.W.2d 636 (Tex. Civ. App. 1951) 21

City of Ferndale v. *Palazzolo*, 62 Mich. App. 140, 233 N.W.2d 216 (1975) 26, 28

City of Fort Worth v. *Atlas Enterprises*, 311 S.W.2d 922 (Tex. Civ. App. 1958) 18

City of Fort Worth v. *McDonald*, 293 S.W.2d 256 (Tex. Civ. App. 1956) 18

City of Hutchins v. *Prasifka*, 450 S.W.2d 829 (Tex. 1970) 20

City of Mesquite v. *Aladdin's Castle, Inc.*, 559 S.W.2d 92 (Tex. Civ. App. 1977) 5, 43, 46

City of Mesquite v. *Aladdin's Castle, Inc.*, 570 S.W.2d 377 (Tex. 1978) 5, 43

City of San Angelo v. *Deutsch*, 126 Tex. 532, 91 S.W.2d 308 (1936) 20

Coates v. *City of Cincinnati*, 402 U.S. 611 (1971) 35

Cohen v. *California*, 403 U.S. 15 (1971) 33

Cole v. *Richardson*, 405 U.S. 676 (1972) 45

Cossack v. *City of Los Angeles*, 11 Cal.3d 726, 523 P.2d 260, 114 Cal. Rptr. 460 (1974) 28, 32, 33

County of Los Angeles v. *Davis*, 440 U.S. 625 (1979) 40, 41, 42, 48

PAGE

Craig v. *Boren*, 429 U.S. 190 (1976) 29

Dandridge v. *Williams*, 397 U.S. 471 (1970) 11

DeFunis v. *Odegaard*, 416 U.S. 312 (1974) 40

Dibrell v. *City of Coleman*, 172 S.W. 550 (Tex. Civ. App. 1914) 17

Dombrowski v. *Pfister*, 380 U.S. 479 (1965) 29

Elfbrandt v. *Russell*, 384 U.S. 11 (1966) 45

Epperson v. *Arkansas*, 393 U.S. 97 (1968) 23

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 38

Ex parte Mihlfread, 128 Tex. Crim. 556, 83 S.W.2d 347 (1935) 17

Ex parte Ogden, 43 Tex. Crim. 531, 66 S.W. 1100 (1902) 19

Ex parte Patterson, 42 Tex. Crim. 256, 58 S.W. 1011 (1900) 19

Ex parte Powell, 43 Tex. Crim. 391, 66 S.W. 298 (1902) 18, 19

Ex parte Spelce, 135 Tex. Crim. 367, 119 S.W.2d 1037 (1938) 17

Falfurrias Creamery Co. v. *City of Laredo*, 276 S.W.2d 351 (Tex. Civ. App. 1955) 15

Familias Unidas v. *Briscoe*, 619 F.2d 391 (5th Cir. 1980) 36

First National Bank v. *Bellotti*, 435 U.S. 765 (1978) 30

Fornaris v. *Ridge Tool Co.*, 400 U.S. 41 (1970) 13

Founding Church of Scientology v. *United States*, 409 F.2d 1146, (D.C. Cir.) (per curiam), *cert. denied*, 396 U.S. 963 (1969) 29

PAGE

414 Theatre Corp. v. *Murphy*, 360 F.Supp. 34 (S.D. N.Y. 1973), *aff'd*, 499 F.2d 1155 (2d Cir. 1974) 30

Gay Students Organization v. *Bonner*, 509 F.2d 652 (1st Cir. 1974) 36

Gilmore v. *City of Montgomery*, 417 U.S. 556 (1974) 35

Ginsberg v. *New York*, 390 U.S. 629 (1968) 37, 38

Gooding v. *Wilson*, 405 U.S. 518 (1972) 29

Goss v. *Lopez*, 419 U.S. 565 (1975) 37

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 43, 45

Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 (1979) 48

Griffin v. *County School Board*, 377 U.S. 218 (1964) .. 23

Healy v. *James*, 408 U.S. 169 (1972) 36

Hormel v. *Helvering*, 312 U.S. 552 (1941) 29

Interstate Circuit, Inc. v. *City of Dallas*, 390 U.S. 676 (1968) 47

Jimenez v. *Weinberger*, 417 U.S. 628 (1974) 23, 25

Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 30

Laird v. *Tatum*, 408 U.S. 1 (1972) 47

Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 46

Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307 (1976) 22

Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974) 39

Meridian v. *Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639 (1959) 11

Michigan v. *Tyler*, 436 U.S. 499 (1978) 12

Midway Manufacturing Co. v. *Drikschneider*, Civ. No. 81-0-243 (D.Neb. July 15, 1981) 31, 32

PAGE

Murdock v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) 12

Murphy v. *California*, 225 U.S. 623 (1912) 24

Murphy v. *Wright*, 115 S.W.2d 448 (Tex. Civ. App. 1938) 17

NAACP v. *Button*, 371 U.S. 415 (1963) 33

National State Bank v. *Long*, 630 F.2d 981 (3d Cir. 1980) 41

New York City Transit Authority v. *Beazer*, 440 U.S. 568 (1979) 13, 20

Nixon v. *Administrator of GSA*, 433 U.S. 425 (1977) 23

North Carolina v. *Rice*, 404 U.S. 244 (1971) 40

Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 24

Parham v. *Hughes*, 441 U.S. 347 (1979) 23

People v. *Glaze*, 27 Cal.3d 841, 614 P.2d 291, 166 Cal. Rptr. 859 (1980) 30

Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976) ..37, 38

Powell v. *McCormack*, 395 U.S. 486 (1969) 39

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 32

Rucker v. *State*, 170 Tex. Crim. 487, 342 S.W.2d 325 (1961) 15, 16

Sam's Loan Office, Inc. v. *City of Beaumont*, 49 S.W.2d 1089 (Tex. Com. App. 1932) 16-17

San Antonio Retail Grocers, Inc. v. *Lafferty*, 156 Tex. 574, 297 S.W.2d 813 (1957) 15, 16

Sawyer v. *Sandstrom*, 615 F.2d 311 (5th Cir. 1980) 36

Schad v. *Borough of Mt. Ephraim*, 101 S.Ct. 2176 (1981) 30

PAGE

Singleton v. *Wulff*, 428 U.S. 106 (1976) 29

Smith v. *Goguen*, 415 U.S. 566 (1974) 42-43, 47

Stanley v. *Georgia*, 394 U.S. 557 (1969) 32

State v. *Bloss*, 613 P.2d 354 (Hawaii 1980) 28, 31

Staton v. *Mayes*, 552 F.2d 908 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977) 29

Stern Electronics, Inc. v. *Kaufman*, Civ.No.CV-80-3248 (E.D.N.Y. May 22, 1981) 31, 32

Taylor v. *State*, 513 S.W.2d 549 (Tex.Crim.App. 1974) 15, 16

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) 37, 38

United States v. *Alabama*, 362 U.S. 602 (1960) (per curiam) 39

United States v. *Brown*, 381 U.S. 437 (1965) 23

United States v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968) 40

United States v. *Hastings*, 296 U.S. 188 (1935) 12

United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 48

United States v. *W.T. Grant Co.*, 345 U.S. 629 (1953) ..40, 41

United States Department of Agriculture v. *Moreno*, 413 U.S. 528 (1973) 25, 27

Vance v. *Bradley*, 440 U.S. 93 (1979) 23

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 23, 25, 35

Village of Belle Terre v. *Boraas*, 416 U.S. 1 (1974) 28

Vlandis v. Kline, 412 U.S. 441 (1973) 26

Walling v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944) 41

PAGE

Washington v. *Davis*, 426 U.S. 229 (1976) 35

Weinberger v. *Salfi*, 422 U.S. 749 (1975) 27

Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975) 23

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 37

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 38

WNEK Vending & Amusements Co., 107 Misc.2d 353, 434 N.Y.S.2d 608 (Sup.Ct. 1980) 31, 32, 33

Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) 30

CONSTITUTIONAL PROVISIONS

U. S. Const. art. III 13

U. S. Const. amend. I 29, 30, 35, 36, 38, 39

U. S. Const. amend. XIV 22, 29

Tex. Const. art. I, § 3 15

Tex. Const. art. I, § 19 .....16, 17

Tex. Const. art. 11, § 5 .....18, 19

STATUTES

28 U.S.C. § 1254(2) 8-14

28 U.S.C. § 1257(2) 12

28 U.S.C. § 2103 .....10, 13

Tex. Penal Code Ann. tit. 4, § 47.01 (Vernon 1974) 19, 25

Tex. Stat. Ann. art. 1175, § 22 (Vernon 1963) 18

Tex. Tax-Gen. Ann. art. 13.02 (Vernon 1975) 19

PAGE

City of Mesquite Ordinance No.

1103 ..... 3-6, 41

1353 ..... *passim*

1410 ..... 8, 34, 39, 42

MISCELLANEOUS MATERIALS

Arcade Operators Survey, Part II, Play Meter (June 1, 1981) 31

Brest, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95 23

F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1928) 13

H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973) 13

M. MCLUHAN, UNDERSTANDING MEDIA (1964) 33

12 MOORE'S FEDERAL PRACTICE (1981) 11

R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE (5th ed. 1978) 11, 13, 14

Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L. F. 746..... 30

17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (1978 ed.) 13

CONSTITUTIONAL AND STATUTORY PROVISIONS CONSTRUED

In addition to the provisions mentioned by Mesquite, this case involves Mesquite Ordinance No. 1410, which is included in the Appendix to this brief, and the following United States and Texas constitutional provisions:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, First Amendment.

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

Texas Constitution, art. 1, § 3.

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Texas Constitution art. 1, § 19.

> Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at any election held for that purpose, adopt or amend their charters, subject to such

limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; and cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years.

Texas Constitution art. 11, § 5.

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1577

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Course of Proceedings Below

Appellee, Aladdin's Castle, Inc., brought this action in the United States District Court for the Northern District of Texas challenging on federal and state grounds the validity of certain provisions of an ordinance of the City of Mesquite, Texas. (J.A. ii, 1-11; S.A. 32.)[1] These provi-

[1] References to the Joint Appendix are designated "J.A." References to the Supplemental Appendix are designated "S.A."

sions prohibited children under 17 years of age from playing coin-operated amusement games unless accompanied by a parent or legal guardian (J.A. 81, 1-11) and set forth, as a standard to be considered in licensing owners of coin-operated amusement games, whether the owner had "connections with criminal elements." (J.A. 82, 109-12.) After trial, the District Court sustained the age restriction but held that the "connections with criminal elements" language violated federal due process because of vagueness. 434 F. Supp. 473 (S.A. 32-41).

Both parties appealed to the United States Court of Appeals for the Fifth Circuit. In a unanimous opinion, that Court affirmed the judgment of the District Court on the "connections with criminal elements" claim and reversed on the age restriction claim, holding that restriction invalid under both the state and federal constitutions. 630 F.2d 1029 (S.A. 1-31). Mesquite's suggestion for rehearing en banc in the Court of Appeals was denied. (J.A. 158.) Mesquite appealed to this Court, which noted probable jurisdiction on May 18, 1981.

Statement of Facts

Background of Aladdin's

At the time of trial in 1977, Aladdin's owned and operated approximately 100 family amusement centers, all of which are located in enclosed suburban shopping malls. (J.A. 28-29.) They contain a variety of visual-audio, coin-operated amusement devices. (S.A. 2.) The company's program of establishing and operating coin-operated, family amusement centers in typical suburban, multi-million dollar enclosed shopping malls was conceived in 1969, and has proven to be very successful. (J.A. 26-27.)

In keeping with their surroundings, the centers are maintained as wholesome places of entertainment, with

tasteful decor and a trained adult attendant on duty at all hours. (J.A. 27, 35.) Each center's hours conform to those of the shopping mall in which it is located. No smoking, food, or beverages of any kind are allowed in the centers, and loitering is prohibited. (J.A. 35, 123.) Aladdin's' center in Mesquite also enforces a rule that bars school-age children from playing the games during school hours. (J.A. 152; S.A. 2.) The enforcement of these rules has contributed greatly to Aladdin's' success. (J.A. 35.)

In April of 1974, Aladdin's was acquired by Bally Manufacturing Corporation ("Bally"), a publicly held company that is traded on the New York Stock Exchange. (J.A. 28.)

NEGOTIATIONS IN MESQUITE

Aladdin's began negotiations in 1975 for opening a center in the Town East Mall in Mesquite. (J.A. 29; S.A. 2.) During negotiations the company discovered two legal obstacles. One was Mesquite's Ordinance No. 1103, which, in addition to making it unlawful to operate a coin-operated amusement establishment without a license, prohibited owners of such establishments from allowing

> any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

(J.A. 29, 75; S.A. 2.) Because the majority ot those who play the games in Aladdin's' centers are minors, such a restriction precludes profitable operation. (J.A. 125.) The second obstacle was that the Town East Mall was not properly zoned for Aladdin's' business use. (J.A. 29.)

In the spring of 1976, at the request of Aladdin's, the City Council removed these obstacles. (J.A. 29.) First, the City Council amended Ordinance No. 1103 by lowering the age restriction to "under the age of seven" for those coin-operated establishments

> located in major shopping centers containing an enclosed mall and said establishments being operated only during the hours said mall is open and having no outside entrance and where said establishments does [sic] not offer for sale or allow the consumption of food, drink or other merchandise.

(J.A. 73.) Second, the City Council amended the city zoning map to allow the operation of coin-operated amusement games within the Town East Mall. (J.A. 69.) No license was to be issued until the company had finished installing its center. (J.A. 29; S.A. 3, 33.)

In reliance upon the City Council's actions, Aladdin's leased space in the Town East Mall and began paying rent in July of 1976. (J.A. 31.) The lease was for ten years at a monthly rental of approximately $2,400, for a total contract amount of some $292,000. (J.A. 152-53; S.A. 4.) In addition, the company spent about $45,000 for leasehold improvements and another $45,000 for equipment and shipping costs. (J.A. 32.)

Mesquite's Denial of the License

When the center was ready for business, Aladdin's applied for a license pursuant to Ordinance No. 1103, as amended. On July 20, Mesquite's city manager, without explanation, refused to issue the license. (J.A. 103; S.A. 4-5, 34.) When Aladdin's appealed to the City Council (J.A. 103), it was advised that the license application had been denied because of the results of a police investigation under the licensing provisions of Ordinance No. 1103, which authorized denial of a license based on the recommendation of the chief of police, which in turn was based on his determination, *inter alia*, of whether the applicant had "connections with criminal elements." (J.A. 76.) The police officer conducting the investigation learned that the stock of Aladdin's was owned by Bally, which at one time

had been indicted for racketeering and gambling activities but had been acquitted of the charges. (J.A. 104.) He decided that Bally was somehow linked to the "Mafia." (J.A. 104; S.A. 34.) On the basis of the investigation the Mesquite chief of police determined that Aladdin's had "connections with criminal elements," and recommended against issuance of a license. The decision of the City Council to deny the license was made in reliance on that recommendation. (J.A. 104.)

STATE COURT PROCEEDINGS

Aladdin's brought suit in Texas state court, in accordance with the procedure set forth in Ordinance No. 1103 (J.A. 77), seeking a mandatory injunction requiring Mesquite to issue it a license. (J.A. 104.) Mesquite's denial of a license was challenged not only on the ground that there was no evidence that Aladdin's or Bally had any "connections with criminal elements," but also on the ground that that phrase was unconstitutionally vague. After an evidentiary hearing, the state court found in favor of Aladdin's on both grounds.[2] (J.A. 102-07.) It specifically found that "no evidence exists whatsoever to prove that Bally Manufacturing Company is controlled or directed by or connected with any criminal elements of any kind whatsoever." (J.A. 105.) The state court also held that the phrase

> 'connections with criminal elements' is vague and indefinite for the reason that such language fails to apprise an applicant of what may constitute forbidden

---

[2] The state district court's decision was affirmed in its entirety by the Texas Court of Civil Appeals. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 559 S.W.2d 92, 94-95 (Tex.Civ.App. 1977). The case was subsequently appealed to the Texas Supreme Court, which affirmed on the facts and did not reach the vagueness issue. 570 S.W.2d 377, 378 (Tex. 1978).

> 'connections' or what may constitute 'criminal elements.' I further conclude that 'connections with criminal elements' is void for the reason that such term is overbroad in that the word 'connections' sweeps within its meaning conduct and associations that are lawful. . . .

(J.A. 106.)

Pursuant to the state court's injunction, Mesquite issued a license to Aladdin's. (S.A. 85.) The company again prepared for business and finally opened on February 5, 1977. (J.A. 34.)

ORDINANCE No. 1353

Two days later, the Mesquite City Council enacted Ordinance No. 1353. This ordinance revived the age restriction of Ordinance No. 1103, making it a misdemeanor for "any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen" to play or operate the machine unless accompanied by a parent or legal guardian. (J.A. 81.) The new ordinance retained the "connections with criminal elements" standard, but this time the City Council attempted to define the phrase.[3] (J.A. 84-85.)

Mesquite has candidly admitted why its City Council reversed itself on its commitment to Aladdin's. It stated to the Court of Appeals that Aladdin's had

> conceal[ed] from the City the fact that Aladdin's was wholly owned by Bally Manufacturing Company, a company formerly, if not currently, owned in part by the notorious Jerado Catena [sic].
>
> When this fact was ferreted out by the police department, a permit to operate was denied.
>
> * * *
>
> Based upon these facts and the knowledge that the State Court would not allow the City to deny a per-

[3] The definition appears at pp. 43-44 n.27, *infra*.

> mit . . . the City Council repented of their earlier action and disbelieved the assurances of Aladdin's Castle, Inc., that it would safeguard the interests of the minors without parental supervision and repealed the earlier ordinance. . . .

(Suggestion for Hearing En Banc in Ct. of App. 1-2.) The state court had already found, after an evidentiary hearing, not only, as noted above, that there was no evidence to prove that Bally was connected with any criminal element, but also that Gerardo Catena "has no relationship" with Bally. (J.A. 105.) There is no evidence in the record that Aladdin's concealed the name of its corporate parent from Mesquite. Inasmuch as Bally is a publicly held company listed on the New York Stock Exchange, the identity of its subsidiaries is public information available in most libraries.

THE PENDING LITIGATION

Aladdin's filed this action on February 11, 1977. (J.A. ii.) The original complaint sought injunctive relief only against enforcement of the age restriction of Ordinance No. 1353 (J.A. 1-11), but was subsequently amended to include a challenge to the "connections with criminal elements" standard. (J.A. 109-112.)[4]

Following a trial on the merits, the District Court, in an opinion issued on June 29, 1977, found the city's justifications for the age restriction "incredibly slender reeds upon which to base an ordinance," but nonetheless upheld

---

[4] A motion for leave to file the amendment was filed on June 6, 1977, four days before trial (J.A. ii) and not on the day of trial, as contended by Mesquite in its brief. (Appnt's Br. 3). On the day of trial, the District Court offered Mesquite the opportunity for a continuance because of the amendment, but the city declined. (Hearing on Permanent Injunction (June 10, 1977) 9-10, 13.)

the restriction as within the city's police power. 434 F. Supp. at 477 (S.A. 38). The court held that the "connections with criminal elements" portion of the ordinance, even with its accompanying definition, was void for vagueness under the due process clause of the Fourteenth Amendment. *Id.* at 476 (S.A. 37). Both parties appealed.

The Court of Appeals affirmed on the vagueness claim and reversed on the age restriction claim. 630 F.2d 1029 (S.A. 1-31). As to the latter, the court found a denial of due process and equal protection under the state and federal constitutions. *Id.* at 1038-44 (S.A. 15-26).

The Court of Appeals was not aware, and Mesquite's brief does not advise this Court, that during the pendency of the appeal, in December of 1977, Mesquite enacted an ordinance, Ordinance No. 1410 (App. to this Br.), that repeals Ordinance No. 1353, upon which the District Court ruled. The new ordinance re-enacts the same age restriction contained in Ordinance No. 1353 but does not contain the phrase "connections with criminal elements."

SUMMARY OF ARGUMENT

Because the judgment of the Court of Appeals on the age restriction claim is supported by independent and adequate Texas law grounds, a decision by this Court on the federal issues under 28 U.S.C. § 1254(2), which prohibits the Court from considering state law issues, would be purely advisory. Deciding the case under section 1254(2) would also deprive the Court of the opportunity to avoid adjudication of the constitutional issues by examining the other issues first. As to the age restriction claim, therefore, the appeal should be dismissed, and the Jurisdictional Statement should be treated as a petition for certiorari. In view of the existence of the adequate state grounds, certiorari should be denied.

If, however, the Court decides to review the case by granting certiorari, it should reach the state law grounds first and affirm on those grounds. The state law grounds include the age restriction's invalidity under the Texas equal protection and due process clauses, its violation of Texas law forbidding the enactment of prohibitive regulations, and Texas law of estoppel.

The age restriction also violates the equal protection clause of the Fourteenth Amendment. Under a rational basis analysis, the restriction is invalid because it was invidiously motivated. In addition, it irrationally imposes on owners of coin-operated game centers a burden not imposed on owners of other commercial amusement centers although both are identically situated so far as the purposes of the ordinance are concerned, fails to distinguish between lawfully and responsibly operated centers and other centers, and imposes a restriction on persons under seventeen that is not rationally related to the legislative purpose. It therefore unconstitutionally discriminates against owners of coin-operated games and children under seventeen. In addition, the restriction abridges fundamental rights of expression and association of children under seventeen and the right of expression of the authors of the games without adequate justification and thereby violates their First Amendment and equal protection rights.

The licensing standard "connections with criminal elements" and its definition violate the due process clause of the Fourteenth Amendment because of vagueness. The vagueness issue is not mooted by the repeal of the challenged provision, because of the likelihood that a violation will recur and because the effects of the past violation are continuing. Even if the Court were to hold the claim moot, the judgment appealed from should be allowed to stand.

ARGUMENT

I.

AS TO THE AGE RESTRICTION CLAIM, THIS COURT SHOULD DISMISS THE APPEAL AND DENY CERTIORARI, BUT, IF THE MERITS ARE REACHED, THE JUDGMENT SHOULD BE AFFIRMED ON STATE LAW GROUNDS.

The judgment of the Court of Appeals as to the age restriction claim is supported by adequate Texas law grounds as well as federal constitutional grounds. The statute on which this Court's jurisdiction is based, 28 U.S.C. § 1254(2), prohibits this Court from considering the state law grounds.[5] A decision by this Court on the federal issues would therefore be purely advisory. Accordingly, the appeal should be dismissed and, pursuant to 28 U.S.C. § 2103, the jurisdictional statement should be treated as a petition for certiorari. In view of the existence of the adequate state grounds, certiorari should be denied. If the Court were to proceed with review on certiorari and consider the case on the merits, it should reach the state law grounds first and affirm the judgment on those grounds.

A. Because The Judgment Is Supported By Independent And Adequate State Law Grounds, This Court Lacks Appellate Jurisdiction Under 28 U.S.C. § 1254(2). Treating The Jurisdictional Statement As A Petition For Certiorari, The Court Should Deny Certiorari.

The Court of Appeals expressly held that the age restriction violates the due process and equal protection

[5] 28 U.S.C. § 1254(2) provides in part that "the review on appeal shall be restricted to the Federal questions presented."

clauses of the Texas Constitution. 630 F.2d at 1038-39. In addition, Aladdin's presented arguments that the Court did not reach, *viz.*, that the age restriction constitutes a prohibitive regulation beyond the power of the municipality to adopt under Texas law, and that the city is estopped under Texas law from enforcing the restriction against Aladdin's. See Brief for Appellant in Court of Appeals at 15-20, 24-25. The District Court reached the estoppel question but ignored the other state law issues. 434 F. Supp. at 478.

This Court will affirm on any adequate ground that finds support in the record, whether or not the court below relied on or even considered that ground. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n.6 (1970). Thus, Aladdin's normally could rely for affirmance on the adequate state grounds, including those on which the Court of Appeals did not rule.[6] Under 28 U.S.C. § 1254(2), however, this Court may consider only the federal grounds upon which the Court of Appeals held Mesquite's ordinance invalid. It would be anomalous indeed if, by invoking section 1254 (2) as the basis for jurisdiction, a party could preclude this Court from reaching the independent and adequate state grounds that support the Court of Appeals' judgment.[7]

---

[6] Inasmuch as Aladdin's does not seek to change the judgment, it was not required to petition for certiorari in order to preserve its right to argue the independent state law grounds that the Court of Appeals did not consider. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 478 (5th ed. 1978).

[7] This Court never has decided the issue addressed in the text, *viz.*, whether the existence of independent and adequate state grounds negates appellate jurisdiction under section 1254(2). *See* 12 MOORE'S FEDERAL PRACTICE ¶ 435.01 [1], at 6-53 (1981). The question was posed but not answered in *Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 640-41 (1959).

The reason such a result cannot occur is that, as Chief Justice Hughes pointed out in his opinion for the Court in *United States* v. *Hastings*, 296 U.S. 188, 193 (1935), when a judgment is supported by an adequate ground that this Court cannot review, a ruling by this Court on another ground would be purely advisory. In *Hastings*, the government appealed from an order in a criminal case under a statute (former 18 U.S.C. § 682) allowing an appeal by the government when the District Court's order dismissing an indictment was based on "the invalidity or construction of the statute upon which the indictment is founded." The Court, in explaining why it was necessary to consider whether the order appealed from was also supported by grounds other than the invalidity or construction of the statute, reasoned that, if the order was so supported, the decision the Court was asked to make concerning the validity of the statute would be "an expression of an abstract opinion." The Court also said:

> Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly.

Id. at 193.

The Court also pointed out that in the analogous situation of an appeal under what is now 28 U.S.C. § 1257(2), when the state court's judgment is supported by an adequate state ground, and hence would not be affected by the Court's decision on the federal ground, the appeal would be dismissed. *Id.*[8]

The "close relationship" between sections 1254(2) and 1257(2) suggests that the same principles that gov-

[8] Section 1257(2) has long been held not to confer jurisdiction to review state court decisions that are supported by independent and adequate state law grounds. *Michigan* v. *Tyler*, 436 U.S. 499, 512 n. 7 (1978). *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 634-35 (1875).

ern jurisdiction under one section generally should obtain under the other as well. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 675-77 n.11 (1974), *citing* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 277-78 (1928). Under these principles, any decision of the federal constitutional issue by this Court in this case would be advisory, in light of the existence of independent and adequate state grounds that this Court is forbidden to consider by 28 U.S.C. § 1254(2).

Moreover, if the appeal were allowed under section 1254(2), the Court would be denied the opportunity to attempt to avoid adjudication of the federal constitutional issues by examining the other issues first. While not a concern of Article III magnitude, as is the prohibition of advisory opinions, the avoidance of federal constitutional adjudication when there potentially are alternative grounds for decision long has been a cornerstone of this Court's jurisprudence. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582-83 n.22 (1979); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring).

For these reasons, the Court should conclude that "[i]f there is any state question that could dispose of the case independently, there is no appeal jurisdiction." 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 4037, at 45 (1978 ed.). See also R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 65-66 (5th ed. 1978); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1580 (2d ed. 1973).

The appeal should therefore be dismissed as to the age restriction, and, as to that claim, the jurisdictional statement should be treated pursuant to 28 U.S.C. § 2103 as a petition for certiorari. *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970); see R. STERN & E. GRESSMAN 66.

Treated as such, the petition should be denied, as are other petitions for certiorari seeking review of judgments supported by adequate state law grounds. *Id.* at 271-72, 285-86. To decide the case on the merits, the Court would be required to decide issues of Texas common law and Texas constitutional law before reaching the federal constitutional questions, an undertaking which would be an improvident allocation of this Court's limited resources.

If, however, the Court decides to grant certiorari, it should consider first the state law challenges to the age restriction and, for the reasons that follow, should find them sufficient to sustain the judgment of the Court of Appeals.[9]

B. The Age Restriction Is Invalid Under Texas Law.

1. The Age Restriction Violates The Texas Constitutional Guarantees Of Equal Protection and Due Process.

As the Court of Appeals expressly held, Mesquite's seventeen-year old age restriction violates Texas constitu-

---

[9] Aladdin's' vagueness claim presents wholly separate issues under a distinct and separable provision of the Mesquite ordinance. Thus, that claim is properly before the Court under section 1254(2). If, however, the Court were to view the vagueness claim as inseparable from the age restriction claim, the presence of unreviewable independent state law grounds on the age restriction issue would prevent review of the vagueness claim under section 1254(2). By treating the jurisdictional statement as a petition for certiorari as to the vagueness challenge as well, the Court could deal properly with both claims. If so treated, the petition also should be denied as to the vagueness claim, inasmuch as the judgments of the District Court and the Court of Appeals as to that issue clearly are correct applications of principles well-settled by the decisions of this Court. See Point III, *infra*.

tional guarantees of both equal protection and due process of law. 630 F.2d at 1038-39. Each of these grounds independently supports the judgment.

(a) Equal Protection.

The equal protection clause of the Texas Constitution guarantees that "[a]ll free men, when they form a social compact, have equal rights." TEX. CONST. art. 1, § 3. A regulation challenged under this provision must have a legitimate public purpose based on promotion of the public welfare, health, or safety, *Falfurrias Creamery Co.* v. *City of Laredo*, 276 S.W.2d 351 (Tex.Civ.App. 1955), and must bear a rational relation to the end it seeks to further. *San Antonio Retail Grocers, Inc.* v. *Lafferty*, 156 Tex. 574, 297 S.W.2d 813 (1957). While the State has broad discretion in the exercise of its power of regulation to classify consistent with the constitutional guarantee, "it is also a rule of law that in order to be valid all persons or things within a particular class or similarly situated must be affected alike." *Taylor* v. *State*, 513 S.W.2d 549, 551 (Tex. Crim.App. 1974). Unequal treatment of persons that is founded upon an unsubstantial or arbitrary classification constitutes unlawful discriminatory state action. *Rucker* v. *State*, 170 Tex. Crim. 487, 342 S.W.2d 325 (1961). Mesquite's age restriction fails to satisfy these requirements of the Texas Constitution.

The lack of rational relationship between the classifications made by the age restriction and the purported purpose of preventing persons under seventeen from being exposed to corrupting influences, truancy, and excessive spending is more fully discussed at pp. 22-28, *infra*. The age restriction violates the Texas equal protection clause by singling out coin-operated amusement game centers and ignoring other amusement centers and establishments that attract the same clientele and present the same potential problems. See pp. 25-26, *infra*.

This conclusion is well supported by decisions of the Texas courts construing the Texas clause. In *San Antonio Retail Grocers, Inc.* v. *Lafferty*, 156 Tex. 574, 297 S.W.2d 813 (1957), for example, the Texas Supreme Court struck down a state statute that prohibited only grocery stores from selling merchandise below cost, holding that the statute unreasonably and arbitrarily exempted other stores that sold similar or identical items. Similarly, in *Taylor* v. *State*, 513 S.W.2d 549 (Tex.Crim.App. 1974), the court found unconstitutional an occupation fee on establishments of $10 for each coin-operated amusement machine, with a minimum fee of $50 and maximum fee of $3,000, holding that the minimum and maximum fees arbitrarily discriminated against small operators and in favor of large operators. And in *Rucker* v. *State*, 170 Tex. Crim. 487, 342 S.W.2d 325 (1961), the court struck down on equal protection grounds an ordinance that imposed a trespassing fine of $25 on peddlers but a fine of $200 on all other persons.

In the case at bar, no reasonable and substantial distinction exists between coin-operated game centers and other amusement establishments that would justify disparate application of the age restriction. The ordinance is therefore void under the Texas Constitution.

(b) *Due Process.*

Ordinance No. 1353 also denies Aladdin's due process of law under the Texas Constitution. Tex. Const. art. 1, § 19. As discussed at pp. 18-20, *infra*, the evidence shows that the ordinance, by precluding profitable operation, would effectively prevent Aladdin's from operating in Mesquite. Its business being a lawful one, Aladdin's has a right to conduct it without injurious interference by Mesquite. In *Sam's Loan Office, Inc.* v. *City of Beaumont*, 49 S.W.2d 1089 (Tex. Com. App. 1932), the court invalidated on state due process grounds an ordi-

nance that made it difficult, if not impossible, to conduct an auctioneering business within the city, stating:

> Since the right to sell goods at auction is a valuable one, duly licensed and protected under the laws of this state, it follows that it is a right duly protected under the above constitutional provision. [TEX. CONST. art. 1, § 19.] Also, since such is the case, and since the city only has the delegated power to regulate, it further follows that the city is without power to either directly or indirectly prohibit such business, or adopt any regulation which will produce such result, or even be unduly oppressive or highly injurious thereto, and any ordinance in contravention of the above rule is condemned by the above constitutional provision.

Id., at 1091.

Other Texas cases have also struck down, on state due process grounds, regulations that had the effect of prohibiting lawful businesses: *Ex parte Mihlfread*, 128 Tex. Crim. 556, 83 S.W.2d 347 (1935) (ordinance levying annual $50 fee for each solicitor employed by photographers); *Bielecki* v. *City of Port Arthur*, 12 S.W.2d 976 (Tex. Com. App. 1929) (ordinance declaring any structure used as a public dance hall to be a nuisance if located within 150 feet of a private dwelling) (*see also Ex parte Spelce*, 135 Tex. Crim. 367, 119 S.W.2d 1037 (1938)); *Murphy* v. *Wright*, 115 S.W.2d 448 (Tex.Civ.App. 1938) (ordinance restricting proximity of dance halls to occupied buildings—alternative ground); *Dibrell* v. *City of Coleman*, 172 S.W. 550 (Tex. Civ. App. 1914) (ordinance banning the keeping of hogs within city limits).

Like the ordinances in the foregoing cases, the age restriction provision here has the effect of prohibiting an otherwise lawful business and lawful use of property therein, and therefore deprives Aladdin's of property interests without due process of law in violation of the Texas Constitution.

2. BECAUSE THE AGE RESTRICTION MAKES IT IMPOSSIBLE FOR ALADDIN'S TO CONTINUE PROFITABLE OPERATION, IT VIOLATES WELL-ESTABLISHED TEXAS LAW FORBIDDING MUNICIPALITIES FROM ENACTING PROHIBITIVE REGULATIONS. IN ADDITION, MESQUITE IS EQUITABLY ESTOPPED FROM ENFORCING THE RESTRICTION.

Two other state law grounds, each of which independently supports the judgment, were argued but not ruled upon in the Court of Appeals.

(a) *Prohibitive Regulation.*

As a "home rule" city, Mesquite is authorized by Texas law to "regulate the location and control the conduct of" establishments such as Aladdin's. TEX. STAT. ANN. art. 1175, § 22 (Vernon 1963). Mesquite may not do so, however, in a manner "inconsistent with the Constitution of the State, or the general laws enacted by the Legislature of this State." TEX. CONST. art. 11, § 5. Accordingly, any municipal regulation prohibiting an activity permitted by state law violates this constitutional provision. *Berry* v. *City of Fort Worth*, 132 Tex. 599, 124 S.W.2d 842 (1939); *Ex parte Powell*, 43 Tex. Crim. 391, 66 S.W. 298 (1902); *Alpha Enterprises, Inc.* v. *City of Houston*, 411 S.W.2d 417 (Tex.Civ.App.), *cert. denied*, 389 U.S. 1005 (1967); *City of Fort Worth* v. *Atlas Enterprise*, 311 S.W.2d 922 (Tex. Civ.App. 1958); *City of Fort Worth* v. *McDonald*, 293 S.W.2d 256 (Tex.Civ.App. 1956). In the *McDonald* case, an ordinance prohibiting pinball machines based on the City Council's finding that they "encourage idleness, loafing, vagrancy, and gambling" was invalidated as inconsistent with Texas state law permitting the operation of pinball games. *Id.* at 258.

A municipality may not accomplish the prohibition indirectly, by making establishments unprofitable through

onerous regulation. *Ex parte Ogden*, 43 Tex. Crim. 531, 66 S.W. 1100 (1902); *Ex parte Patterson*, 42 Tex. Crim. 256, 58 S.W. 1011 (1900). For example, in *Ex parte Powell*, the court struck down a city ordinance which imposed a fine on selling horse racing pools as inconsistent with Texas law, which not only permitted but also taxed the enterprise. In *Ogden*, the court struck down a different section of the same ordinance which, while it did not prohibit the selling of pools entirely, permitted their sale only at certain designated locations. The court held that since the selling of pools was "a legitimate business—one legalized by the state—the City could not, even in this indirect manner, inhibit it." 66 S.W. at 1101.

In the case at bar, the same elements of a violation of the Texas Constitution, art. 11, § 5, are present. It is undisputed that Texas law permits the operation of coin-operated games.[10] The prohibitive impact of Mesquite's age restriction also is beyond question. The evidence shows that, because the majority of Aladdin's customers are minors, application of the age restriction would cause Aladdin's to operate at a loss. (J.A. 125). As the Court of Appeals stated:

> [t]he city council thus reenacted the age restriction it had previously eliminated at Aladdin's request. The earlier contacts between Aladdin's and the city council indicate that the council knew that this change would clearly make Aladdin's Mesquite center unprofitable and force it to close. In short, Mesquite achieved the result denied it by the state court judgment.

---

[10] Games that allow free plays are permissible under the cited provision so long as the free plays are "an unrecorded and immediate right to replay not exchangeable for value." TEX. PENAL CODE ANN. tit. 4, § 47.01(8) (Vernon 1974). The state has recognized the legitimacy of coin-operated games by imposing an operating tax on them. TEX. TAX-GEN. ANN. art. 13.02 (Vernon 1975).

630 F.2d at 1035. The age restriction is therefore an indirect prohibition of a legitimate enterprise, and as such invalid under Texas law.

This ground of invalidity was fully briefed in the courts below and "involves the application of settled legal principles to uncontroversial facts." *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583-84 n.24 (1979). Therefore, if this Court reaches the merits it should sustain the judgment with respect to the age limitation on this ground.

(b) *Equitable Estoppel.*

Mesquite is equitably estopped, under Texas law, to enforce the ordinance because of conduct by Mesquite that the Court of Appeals described as "a very unpleasant story." 630 F.2d at 1044. Mesquite amended its ordinances to permit the Aladdin's center and to remove the age restriction, knowing that Aladdin's would invest large sums in reliance on that action, and then, after Aladdin's had done so, changed its ordinances to reinstate the age limitations and thereby effectively prohibit Aladdin's from operating profitably.[11]

Under Texas law, Mesquite is subject to a plea of estoppel based on its action in this case. The Texas courts long have recognized that "a municipality may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions." *City of Hutchins* v. *Prasifka*, 450 S.W.2d 829, 836 (Tex. 1970). *See also City of San Angelo* v. *Deutsch*, 126 Tex. 532, 91 S.W.2d 308 (1936); *City of Cuero* v. *Tupper-Texas, Inc.*, 226 F.2d 121 (5th Cir. 1955) (apply-

---

[11] Moreover, Mesquite has admitted that the real reason for the imposition of the age limitations was its stubborn and unfounded belief, contrary to the findings of the state court, that Bally, the parent corporation of Aladdin's, had "connections with criminal elements." *Supra*, pp. 6-7.

ing Texas law). The Court of Appeals' statement of the pertinent facts shows why application of an estoppel is appropriate in this case:

> (1) the business, acting in good faith and with full disclosure, informs the municipality of its plans, (2) the municipality encourages the business in a significant manner, such as by amending existing legislation, (3) the business detrimentally relies on that encouragement, and (4) no conditions, including the composition of the city council and the local political climate, have changed.

630 F.2d at 1044.

Mesquite's conduct is similar to that successfully challenged in the *City of Cuero* case, in which the court found that the party dealing with the city had relied to its detriment upon the city's delivery of a deed and passage of certain ordinances, and the city had not attacked the validity of the deal until after reasonable reliance on those actions.

City of Dallas v. *Rosenthal*, 239 S.W.2d 636, 645 (Tex. Civ.App. 1951), also holds a municipality equitably estopped on similar facts. There, although a property owner had exceeded the permission granted in a building permit, the court held that the city's awareness of the nonconformance estopped it from enjoining use of the premises. The estoppel was based upon the city's inaction in the face of the citizen's unauthorized construction, and was effective even though the city was acting in its governmental capacity. *Rosenthal* is thus strong precedent for finding estoppel here, where Aladdin's' action to its detriment was fully authorized by city ordinances. The judgment of the Court of Appeals should be affirmed on this additional state law ground.

II.

THE AGE RESTRICTION VIOLATES RIGHTS PROTECTED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

If this Court reaches the federal constitutional issues, it should hold that the ordinance violates the equal protection clause of the Fourteenth Amendment. This is so whether the Court applies the test of rational relationship of the classification to a legitimate state purpose or the strict scrutiny test applicable when a fundamental right is involved.

A. The Provision Bears No Rational Relationship To A Legitimate State Purpose.

In the rational relationship test, the relevant relationship is, of course, between the classification and the legislative purpose, *see, e.g., Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 312 (1976), not, as Mesquite appears to assume in its brief, between the restriction and the purpose. The ordinance makes two classifications that are pertinent here: (1) between owners of coin-operated game centers and owners of other commercial amusement establishments, and (2) between persons under seventeen and persons seventeen and over. The asserted purposes are (1) to protect minors from gambling, the sale of narcotics, and other unlawful activities (J.A. 18-19, 80; Appnt's Br. 5, 13); (2) to discourage truancy (J.A. 19; Appnt's Br. 5, 13); (3) to prevent minors from imprudently spending their lunch money (J.A. 18-19); and (4) to contribute generally to the health, welfare, and morals of the inhabitants of Mesquite (J.A. 80-81; Appnt's Br. 17-22).

1.

This Court need not blindly accept assertions of legislative purpose when the history of the legislation affirmatively demonstrates a different goal. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975); *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974). *See also Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977). Notwithstanding Mesquite's present asserted justifications for Ordinance No. 1353, the history of the ordinance and the city's own admission shows that the purpose was to prevent Aladdin's from continuing business in the city because of a purported criminal relationship "ferreted out" by a police investigation. See pp. 6-7, *supra*. The state court already had found, in a proceeding to which Mesquite was a party and in which it had a full opportunity to offer evidence and be heard, that there was no evidence of such a relationship. (J.A. 105.) The actual reason for passage of the ordinance was thus unreasonable, unfair, and arbitrary.

Under these circumstances, the ordinance, contrary to the city's argument (Appnt's Br. 12-16), is not entitled to the judicial deference traditionally accorded legislative acts. *Village of Arlington Heights*, 429 U.S. at 265-66. Deference should be accorded only absent "invidious discrimination" or "some reason to infer antipathy." *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). Here the City Council's action is, in its purpose and effect, a bill of attainder against Aladdin's. *Cf. Nixon* v. *Administrator of GSA*, 433 U.S. 425, 472 (1977); *United States* v. *Brown*, 381 U.S. 437, 447 (1965). Legislative action that is unconstitutionally motivated should be held invalid. *Epperson* v. *Arkansas*, 393 U.S. 97, 107-09 (1968); *Griffin* v. *County School Board*, 377 U.S. 218, 231 (1964). *See also* Brest, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 116-18.

2.

Even if invidious discrimination were absent, the classifications made by the ordinance are irrational and arbitrary, and fail to advance the city's purported goals.

We recognize at the outset that *Murphy* v. *California*, 225 U.S. 623 (1912), upheld a municipal ordinance prohibiting commercial billiard halls against substantive due process and equal protection challenges.[12] In rejecting the substantive due process argument, the Court appeared to take judicial notice that "idleness and other evils" were nurtured by billiard halls. The equal protection rulings were that a commercial billiard hall operator was not denied equal protection by reason of the ordinance's exemption of billiard rooms maintained for use of guests by hotels having 25 rooms or more, and that the operator lacked standing to complain of the classification between larger and smaller hotels.

Although *Murphy* can be distinguished on the ground that the equal protection issues raised there were different from those presented here, sentiments expressed by the Court in deciding the due process issue support the moralistic rationale advanced in Mesquite's brief. Since 1912, however, much has changed, including the Court's view on the moral quality of idleness and on the constitutional protections to which private, lawful conduct is entitled. *See, e.g., Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 163-64, 165-71 (1972). The philosophical underpinnings of

---

[12] The strict scrutiny standard had, of course, not been developed in 1912 and was not applied in *Murphy*, so that decision does not affect the challenges to the age restriction based on the fundamental rights of expression and association. See pp. 29-39, *infra*.

a 1912 substantive due process ruling should not govern an equal protection decision by today's Court.

Two rational basis decisions of the last decade in which the Court invalidated statutes are pertinent here. *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), held that a classification that denied food stamp eligibility to households whose members were not "all related to one another" did not bear a rational relationship to, *inter alia*, "the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program." *Id.* at 535-38. *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974), held that a classification determining dependency and hence entitlement under the Social Security Act for disability insurance benefits between two classes of illegitimates born after the parent's disability was not reasonably related to the asserted governmental purpose of preventing spurious claims. *Id.* at 635-37. In both of these cases, the Court was willing to consider whether the classification had any realistic relationship to the legislative purpose. If *Moreno* and *Jiminez* are still viable, the same question should be asked and answered here.

The age restriction improperly draws a distinction between owners and operators of coin-operated games and all other proprietors of amusements. *Cf. Jiminez* v. *Weinberger*, 417 U.S. at 637. There is no rational basis for concluding that gambling,[13] narcotics sales, truancy, or spending of lunch money occur in connection with the

---

[13] The amusement games owned and operated by Aladdin's are not gambling devices under Texas law. *See* TEX. PENAL CODE ANN. tit. 4, §§ 47.01-47-07 (Vernon 1974), which defines gambling, and TEX. PENAL CODE ANN. tit. 4, § 47.01, at 296 (Note by Searcy & Patterson), which indicates that the definition of gambling intended to "exclude amusement-type pinball machines" and similar devices from the prohibition of Texas law. Mesquite's argument is apparently that the games provide an opportunity to make

(footnote continued)

playing of coin-operated games more frequently than with other commercial games and amusements, such as bowling alleys, miniature golf establishments, and carnivals. These commercial amusements share the same clientele, are readily accessible to youths under seventeen, and are within their typical budget. The owners and operators of these other games and devices, which are not subject to the age restriction, are situated identically, so far as the purported purposes of the age restriction are concerned, to owners of coin-operated games. *See, e.g., City of Ferndale* v. *Palazzolo*, 62 Mich. App. 140, 146-47, 233 N.W.2d 216, 220 (1975) (ordinance that prohibited operation of pinball machines but did not apply to bowling alleys violated equal protection clause).

Also, the age restriction improperly fails to distinguish between coin-operated game locations that, like Aladdin's, are clean, safe, and lawfully and responsibly operated, and those that are not. This failure to distinguish between types of establishments also is an improper classification that invalidates the restriction.[14]

(footnote continued)

"side bets." Of course, any game where a score is kept would do the same thing, but, more important, only playing is inhibited by the ordinance and non-players are as able to make side bets as players. Mesquite has admitted, in any event, that it is unaware of any gambling ever having occurred. (J.A. 66.)

[14] No doubt it is easier for Mesquite to assume that all coin-operated amusement centers will give rise to the ills the restriction purports to address than it would be for the city to determine this question on a case-by-case basis. Referring to the classification as an improper conclusive presumption, which also can be said of the classification at bar identified in the text, this Court said in *Vlandis* v. *Kline*, 412 U.S. 441, 451 (1973), "The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity." Moreover, administrative ease and certainty are not even relevant considerations in this case, where conducting case-by-case inquiries of the two coin-operated

(footnote continued)

Moreover, the distinction between youths under seventeen and those seventeen and over is irrational because the restriction on the former class fails, as Mesquite all but admits, to further the purported legislative purposes. *See United States Department of Agriculture* v. *Moreno*, 413 U.S. at 537. As the city acknowledged in its jurisdictional statement at 3, the ordinance allows children of any age to frequent coin-operated game centers. Although a child under seventeen may not play a game even if he is accompanied by a grandparent, or by a parent of a friend, he may, without parent, legal guardian, or supervision of any kind, be present when the game is being played by another. Thus, the ordinance does not protect children from coming into contact with whatever occurs at coin-operated game locations or even from paying for another to play a game. The only thing they cannot do is to play the coin-operated games, an activity which, in itself, is not the evil sought to be remedied. The restriction itself does not, therefore, achieve its purported purposes directly. It does so, if at all, only by discouraging persons under seventeen from congregating through removing an incentive to do so, and thus impermissibly interfering with the First Amendment right of association. See pp. 34-36, *infra*.

Furthermore, as to the asserted truancy justification, the age restriction not only allows children to frequent coin-operated game centers during school hours so long as they do not play the games, but is also irrationally overinclusive: it prohibits them from playing the games during hours when school is not in session, when it can have no

---

(footnote continued)
amusement centers in Mesquite certainly would not tax unduly the city's resources. Hence, this case is unlike *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975), where the "expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule."

relationship whatsoever to truancy. The restriction is not reasonably limited, as it could easily be, to school hours. Aladdin's' Mesquite center does not permit school children to play the games during school hours. (J.A. 152; S.A. 2.)

Mesquite's final justification for the age restriction, that it contributes generally to the health, welfare, and morals of its citizens, represents nothing more than a value judgment about the relative benefit of coin-operated amusement games in Mesquite. The provision clearly has nothing to do with health, and we are not aware of any case in which this Court has upheld a classification on the sole ground that it somehow contributes to general welfare and morals in some subjective, unarticulated way.[15]

In summary, the age restriction makes arbitrary classifications bearing no rational relationship to the ordinance's purported purposes. Several state courts that have addressed restrictions on coin-operated games have correctly held that they violate the equal protection clause of the Fourteenth Amendment. *Cossack* v. *City of Los Angeles*, 11 Cal. 3d 726, 734, 523 P.2d 260, 265, 114 Cal. Rptr. 460, 465 (1974); *State* v. *Bloss*, 613 P.2d 354, 358-61 (Hawaii 1980); *City of Ferndale* v. *Palazzolo*, 62 Mich. App. 140, 146-47, 233 N.W.2d 216, 220 (1975). This Court should reach the same result.

---

[15] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (Appnt's Br. 18, 22), is not such a case. There the Court upheld a zoning ordinance limiting land use to one-family dwellings, and defining the word family to preclude occupancy by more than two unrelated persons. While the Court referred to general considerations of "family values" and "youth values," it specifically observed that the zoning restriction was rationally designed to alleviate concrete "urban problems" of lack of space, traffic congestion, and excessive noise. 416 U.S. at 9. *Belle Terre* cannot stand for the proposition that "the desire to protect moral values" (Appnt's Br. 19) cures the constitutional defect in an arbitrary and irrational legislative classification.

B. Ordinance No. 1353 Abridges The Fundamental Rights Of Expression And Association, And Cannot Be Justified Under The Strict Scrutiny Test.

The ordinance also abridges fundamental personal rights of expression and association, and cannot survive the strict scrutiny by which such a regulation must be tested.[16]

The city complains that the strict scrutiny question was considered for the first time in the Court of Appeals, although it does not argue that this alone warrants reversal. (Appnt's Br. 6, 11.) The Court of Appeals clearly had power to reverse on grounds not considered by the District Court. *Hormel* v. *Helvering*, 312 U.S. 552 (1941). The exercise of that power is "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). When important Fourteenth and First Amendment interests are implicated, as they are here, a Court of Appeals may properly exercise its discretion to consider the issue. *See, e.g., Staton* v. *Mayes*, 552 F.2d 908, 915 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977); *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1164 n.2 (D.C. Cir.) (per curiam), *cert. denied*, 396 U.S. 963 (1969).

Mesquite has not shown that, because the strict scrutiny issue was not before the District Court, prejudice occurred. The record is plainly adequate for a determination of whether the First Amendment rights asserted here exist. The only reason for remanding would be to take additional evidence on whether there is a compelling state in-

---

[16] The right of Aladdin's to assert the rights of third persons who are affected by the ordinance is not put in issue by Mesquite in its Appellant's Brief and is beyond challenge. *Carey* v. *Population Services International*, 431 U.S. 678, 683-84 (1977); *Craig* v. *Boren*, 429 U.S. 190, 192-97 (1976); *Gooding* v. *Wilson*, 405 U.S. 518, 520-21 (1972); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-87 (1965).

terest justifying the restriction. Although Mesquite implies that it would have offered additional evidence, presumably on the latter issue, it does not indicate what that evidence would have been, and it is fair to assume that it would have been merely cumulative. The city's conditional request for a remand on that issue should be denied.

1. The Right of Expression.

The First Amendment's broad protection of free speech guarantees an individual's right of self-expression and right to receive others' expressions and ideas. *See, e.g., First National Bank* v. *Bellotti*, 435 U.S. 765, 777 n.12 (1978); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972). *See* Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U.Ill.L.F. 746, 752-53. Because entertainment is a form of communication and expression, this First Amendment protection extends to it in its many forms. *Schad* v. *Borough of Mt. Ephraim*, 101 S.Ct. 2176, 2181 (1981); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977). Certainly, when the scope of coverage extends to expressive entertainment on the very periphery of the First Amendment, such as the nude dancing involved in the *Mt. Ephraim* case,[17] coin-operated games are entitled to no less protection.

Coin-operated games, as a legal and creative form of entertainment and expression, are not constitutionally distinguishable from other similarly legitimate means of entertainment. Video games, which represent about two-

[17] Even coin-operated video or motion picture "peep shows" have been held entitled to constitutional protection. *People* v. *Glaze*, 27 Cal. 3d 841, 614 P.2d 291, 166 Cal. Rptr. 859 (1980). *See also 414 Theatre Corp.* v. *Murphy*, 360 F. Supp. 34 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 1155 (2d Cir. 1974).

thirds of the market today,[18] each contain a cathode ray tube upon which a series of related images are projected by means of electronic equipment. *Midway Manufacturing Co.* v. *Drikschneider*, Civ. No. 81-0-243, Slip. Op. at 3, 13 (D. Neb. July 15, 1981). The subject matter of the game is fixed in a computer program stored in a memory device that, with the aid of electronic circuitry, can continually reproduce the visual display. *Stern Electronics, Inc.* v. *Kaufman*, Civ. No. CV-80-3248, Slip Op. at 6 (E.D.N.Y. May 22, 1981). Once a coin is deposited and the game begins, the player or players are able to control some of the images on the screen, and the others move in a predetermined sequence and interact with the player-controlled images. *Midway Manufacturing Co.*, Slip Op. at 4. Success in the games requires a high degree of skill and depends on "eye-hand coordination, reflexes, muscular control and above all, concentration." *WNEK Vending & Amusements Co.* v. *City of Buffalo*, 107 Misc. 2d 353, 434 N.Y.S.2d 608, 612 (Sup.Ct. 1980). Modern day pinball games likewise require skill and have been said to be "indistinguishable from other skill-related amusement games which minors are allowed to play." *State* v. *Bloss*, 613 P.2d 354, 361 (Hawaii 1980). The rights to enjoy these games and to author and distribute them should be entitled to a broad measure of constitutional protection.

Coin-operated games, and particularly the electronic video games that are the principal subject of the case at bar, embody in a tangible form the author's expression of a particular idea or fantasy. Design of a successful game requires an author to convey his theme or idea through a combination of audio and visual effects to produce an attractive and stimulating contest of skill. Develop-

---

[18] *Arcade Operators Survey, Part II, Play Meter* at 21 (June 1, 1981).

ment of a new game takes a manufacturer from eight months to a year and requires a substantial investment. *Stern Electronics, Inc.*, Slip Op. at 5. Games sell for as much as $5,000 each. (J.A. 32.) The creativity and originality necessary to produce a successful video game has convinced the courts to provide these games with the protection of the copyright laws.[19] Restricting access of others to the games is an interference with the First Amendment right of expression of the author, and the First Amendment right of the manufacturer and seller and of Aladdin's to publish the author's expression.

The restriction here is also an interference with minors' First Amendment rights. One of these rights is to benefit from exposure to the creative expression the games convey. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389-90 (1969); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). Another is to enjoy, as a participant in the game, the self-expression for which the game provides an effective medium. A video game is "a movie in which the viewer participates in the action." *Stern Electronics, Inc.* v. *Kaufman*, Slip Op. at 8. The player matches his wits and reflexes against those programmed into the game. Mastery of these games requires the development of skill and the exercise of "a high degree of concentration." (Appnt's Br. 26.) *See Cossack* v. *City of Los Angeles*, 11 Cal. 3d 726, 523 P.2d 260, 114 Cal. Rptr. 460 (1974); *WNEK Vending & Amusements Co.* v. *City of Buffalo*, 107 Misc. 2d 353, 434 N.Y.S.2d 608 (1980).

In the premium the games place on skill and concentration, they are "fundamentally" the same as athletic or semi-athletic games such as archery, quoits, horseshoes, and shuffleboard, *see, e.g., Cossack* v. *City of Los Angeles*,

---

[19] *See, e.g., Stern Elec. Inc.* v. *Kaufman*, No. CV-80-3248 (E.D. N.Y. May 22, 1980); *Midway Mfg. Co.* v. *Dirkschneider*, No. 81-0-243 (D. Neb. July 15, 1981); *Cinematronics, Inc.* v. *Shapiro*, No. Civ. 81-328 (D. Ariz. April 17, 1981). Copies of the slip opinions referred to have been lodged with the Court.

11 Cal. 3d at 735, 523 P.2d at 266, 114 Cal. Rptr. at 466, and non-athletic games such as bridge. In games, as in artistic pursuits such as painting or ballet, the participant derives pleasure and satisfaction commensurate with his skill and talent. These activities, although non-verbal, are means of individual expression. As Marshall McLuhan observed:

> Games as popular art forms offer to all an immediate means of participation in the full life of a society, such as no single role or job can offer to any man.
>
> • • •
>
> That games are extensions, not of our private but of our social selves, and that they are media of communication, should now be plain.

M. McLuhan, Understanding Media 210, 216 (1964).

As games of skill, coin-operated amusement games are also vehicles for competition, which is another kind of self-expression for the participants. Whether the competition occurs informally at an amusement center or as part of an organized contest,[20] it provides a player with an opportunity to express his individuality by competing and to communicate with others of similar interests.

Mesquite attempts to denigrate the rights associated with coin-operated games as inconsequential and frivolous. This Court long ago, however, rejected the notion that the level of protection given any expression turns on its importance or social utility. *Cohen* v. *California*, 403 U.S. 15, 24-26 (1971); *NAACP* v. *Button*, 371 U.S. 415, 444-45 (1963). The protection given a constitutionally protected right does not vary with the value judgments made by legislative bodies as to the significance of the right.

---

[20] A recent competition in New York on a video game sponsored by the game's distributor attracted over 4,000 entrants. See *WNEK Vending ! Amusements Co.* v. *City of Buffalo*, 107 Misc. 2d 353, 434 N.Y.S.2d 608, 617 (1980).

2. The Right of Association.

The record in this case leaves no doubt that the age restriction, if it was adopted for the reasons the city professes and not solely because of antipathy toward Aladdin's, see p. 23, *supra*, is designed to prevent, in the words of the ordinance's preamble, "congregation of youthful patrons." (J.A. 80.) This is accomplished not by a direct prohibition against congregating, but by prohibiting youths from playing the games unless accompanied by a parent or guardian and thereby discouraging them from coming to the game center. The playing of the games, which is the activity prohibited by the restriction, is not in itself claimed to give rise to the problems the ordinance is allegedly aimed at alleviating. The games are simply the reason for the congregating that the ordinance seeks to prevent.

That the city council did not consider the act of playing coin-operated amusement games itself detrimental to youth is clear from the ordinance. In addition to permitting minors to play the games at amusement centers when accompanied by a parent or guardian, the ordinance exempts coin-operated amusement games operated by local, state, or federal governmental entities, or by charitable organizations. (J.A. 84.)[21] None of the city's witnesses at trial suggested that youths were harmed by the act of playing coin-operated games. Their testimony sought to establish the need to eliminate a meeting place for youths in an effort to stem disorderly conduct and truancy, the root causes of which they acknowledged were unrelated to coin-operated amusement centers (J.A. 134-41), and to protect children from exposure to an "unwholesome" atmosphere, which they could not say existed at Aladdin's Castle. (J.A. 146-

[21] Although these references are to Mesquite Ordinance No. 1353, the analysis is equally applicable to Ordinance No. 1410, which reincorporates the identical provisions and legislative findings.

48.) The city seeks to deal with these problems by discouraging "congregation of youthful patrons." Unless the ordinance achieves that, it serves no purpose whatsoever. See p. 27, *supra*.

The Mesquite ordinance is thus designed to interfere with the First Amendment right of association. This Court has made it plain that a regulation neutral on its face is subject to constitutional challenge if adopted for an impermissible purpose. *Washington* v. *Davis*, 426 U.S. 229, 241 (1976). Nor must an aggrieved party prove that the impermissible purpose was the sole motivation for the legislative act. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977). *Arlington Heights* permits a plaintiff to pierce the facial validity of a legislative act and, using evidence such as the sequence of events leading up to the challenged legislative act, legislative history, and the testimony of officials, to prove that one of the purposes of the act is impermissible. *Id.* at 267-68. In the case at bar, the preamble of the ordinance, its structure as a whole, and the testimony elicited in the District Court make it clear that the Mesquite ordinance was aimed at discouraging associational conduct.

Although, as the Court of Appeals observed, this Court has not expressly decided the point, it has assumed that a right of social association exists. *See Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1974); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615-16 (1971). Association for social purposes should be entitled to the same protection as association for political or other purposes. The language of the First Amendment does not restrict the purposes to which the right applies. The right of expression extends to entertainment contexts and there is no reason the right of social association should not have the same scope.

Speaking of associational rights, this Court has said, " 'Freedoms such as these are protected not only against

heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy* v. *James*, 408 U.S. 169, 183 (1972), *quoting Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960). In *Healy*, officials of a state college denied official school recognition to the local chapter of Students for a Democratic Society (SDS) because the published aims of the national SDS chapter included disruption and violence. The school contended that, although nonrecognition prevented the group from using various campus facilities, it did not abridge the group's associational rights. This Court disagreed, holding that the disabilities imposed constituted an impermissible infringement of these rights. *See also Familias Unidas* v. *Briscoe*, 619 F.2d 391 (5th Cir. 1980) (statute empowering judge to exact disclosure of membership lists of groups interfering with school operations violates right of association); *Gay Students Organization* v. *Bonner*, 509 F.2d 652 (1st Cir. 1974) (prohibiting organization from holding social activities on campus held to deny members of the organization their associational rights).

Mesquite may, of course, seek to eliminate the problems of truancy and exposure of youth to illegal activities by attacking those problems directly.[22] It may not, however, inhibit the lawful gathering of citizens on the theory that the gathering may lead to unlawful conduct. *See, e.g., Sawyer* v. *Sandstrom*, 615 F.2d 311, 318 (5th Cir. 1980).

3. Regulation of Minors

Mesquite argues that despite its broad restriction on First Amendment rights, the ordinance is constitutional simply because the rights abridged are those of minors

[22] For example, in combating truancy, the city could simply prohibit minors from playing the games during school hours. The city could minimize corrupting influences at amusement centers by requiring the presence of an adult attendant at all times.

and, thus, entitled to a lesser degree of protection. (Appnt's Br. 23-25.) In so arguing, Mesquite ignores not only the rights of the games' creators, discussed above, but also the well-established principle that minors "are possessed of fundamental rights which the State must respect." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969). *Accord, Planned Parenthood* v. *Danforth*, 428 U.S. 52, 74 (1976). "A child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti* v. *Baird*, 443 U.S. 622, 633 (1979) (plurality opinion by Powell, J.).

To be sure, in certain limited circumstances "the state may have greater power to regulate conduct that is otherwise constitutionally protected if the regulation applies only to children," as the Court of Appeals recognized. 630 F.2d at 1042. This limited right to restrain minors in a way that would be unconstitutional if applied to adults stems from

> the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. *Baird*, 443 U.S. at 634. The special circumstance of youth, however, cannot be invoked to justify all restrictions on minors' constitutional rights. *See, e.g., Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Goss* v. *Lopez*, 419 U.S. 565 (1975). This Court has been especially reluctant to permit the infringement of minors' rights in the area of First Amendment freedoms. *See Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). Thus, although a different standard of obscenity is appropriate for minors, *Ginsberg* v. *New York*, 390 U.S. 629, 638 (1968), "[s]peech that is

neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213-14 (1975). The First Amendment right of freedom of association for a lawful purpose is entitled to similar protection.

In this case, none of the conditions precedent for applying the lesser measure of constitutional protection obtain. Neither the playing of amusement games nor the congregation of minors at amusement centers present dangers unique to minors. Neither playing coin-operated games nor congregating with one's peers involves minors in the making of a critical decision requiring state guidance. Minors who can decide to participate in political debate, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), and to obtain an abortion, *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976), can certainly decide without state input whether to visit these centers or to spend a quarter on a game.

Finally, the ordinance cannot be justified as an attempt to assist parents in the upbringing of their children. The ordinance, in fact, has the opposite effect by burdening parents and usurping their primary role in child-rearing. *See Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Unlike parents in New York who could avoid the restriction on sales to minors by themselves simply buying the magazines for their children, *Ginsberg* v. *New York*, 390 U.S. at 639, parents who decide to permit their children to enter and play at these amusement centers now must accompany their children on each visit. If a parent has no objection to the child visiting the centers and playing the games unescorted, the state has no right to overrule that decision.

4. Strict Scrutiny.

The unjustified abridgment of First Amendment rights is an independent ground for holding the ordinance invalid without reference to an equal protection analysis. In addition, that abridgment makes the strict scrutiny test for equal protection applicable. Under that test, the classification based on age can stand only if it serves a compelling state interest and is no more restrictive than is necessary to protect that interest. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 269 (1974). The discussion at pp. 24-28, *supra*, of the interests purportedly served demonstrates that the ordinance cannot meet the strict scrutiny test.

III.

ORDINANCE NO. 1353's "CONNECTIONS WITH CRIMINAL ELEMENTS" LICENSING STANDARD IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Passage Of Ordinance No. 1410 Does Not Render This Appeal Moot, As The City's Action Is Merely A Voluntary Cessation Of The Impermissible Conduct.

While the appeal was pending in the Court of Appeals, Mesquite repealed the ordinance in issue in this case, and enacted in its stead an ordinance continuing the age restriction but not containing the reference to "connections with criminal elements" and its accompanying definition. Inasmuch as the law at the time of appeal generally controls, *United States* v. *Alabama*, 362 U.S. 602, 604 (1960) (per curiam), this action by Mesquite raises the question of whether the case now is moot with respect to the vagueness issue.[23] As mootness is a jurisdictional question that the

[23] Even if the Court were to find the vagueness issue moot, this would not affect the Court's jurisdiction over the age restriction claim, *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969), although for the reasons stated at pp. 10-14, *supra*, the appeal should be dismissed and certiorari denied as to that claim.

Court must consider, *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam), Aladdin's brings this matter to the Court's attention. We suggest, however, that the vagueness issue is not moot.

Mootness results when events occur during pendency of the appeal that make it impossible for a reviewing court to render a judgment affecting the rights of the litigants. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam). When the supervening event is a voluntary cessation of challenged conduct, the test for mootness is stringent, for without the compulsion provided by a binding judgment "[t]he defendant is free to return to his old ways" and thus avoid an adjudication of the legality of his conduct. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). In such cases, mootness will be found only if "it can be said with assurance" that (1) there is no reasonable expectation of the violation recurring, and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). In this case, neither criterion is satisfied.[24]

First, there is "a reasonable expectation" of recurring violation. Significantly, Mesquite modified its ordinance only after the adverse District Court ruling. In the *W.T. Grant* case, the Court noted the special need "to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandon-

---

[24] Mesquite's formal amendment of its ordinance clearly constitutes voluntary cessation, and is entitled to no greater consideration than is informal voluntary cessation undertaken by private parties. *Compare Concentrated Phosphate Export Ass'n*, 393 U.S. at 203 (amendment of government regulations) *with W.T. Grant Co.*, 345 U.S. at 630-31 (elimination of interlocking directorates).

ment seems timed to anticipate suit." 345 U.S. at 632-33 n.5. On the other hand, the Court in *County of Los Angeles* found there was "no reason to believe that petitioners would replace their present hiring procedure with procedures that they regarded as unsatisfactory [and abandoned] even before the commencement of this litigation." 440 U.S. at 632-33.

It is also significant that the city has vigorously asserted the validity of the "criminal elements" provision both in the Court of Appeals and in this Court. In *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944), the Court declined to treat as moot an action under the Fair Labor Standards Act even after the defendant employer had changed its pay method voluntarily, observing that "[r]espondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." *See also National State Bank* v. *Long*, 630 F.2d 981, 983-984 n.2 (3d Cir. 1980).

Mesquite's attachment to the phrase "connections with criminal elements" has persisted since 1973, when Ordinance No. 1103 was adopted. Even after a state court held that phrase impermissibly vague, Mesquite attempted to save the phrase by adding a definition thereof to the ordinance. The deletion of the phrase and its definition after an adverse judgment and pending appeal hardly suggests a change of heart. It cannot be said with assurance that there is no reasonable expectation that the provision will reappear in a future ordinance if this case is held moot.[25]

[25] Even were Mesquite to proclaim its unequivocal abandonment of the phrase "connections with criminal elements," such a pronouncement would not suffice to render the case moot. At most, this pronouncement would be entitled to consideration in determining the continuing need for an injunction against the discontinued act. *United States* v. *W.T. Grant Co.*, 345 U.S. at 633.

As for the second condition of mootness stated in *County of Los Angeles*, 440 U.S. at 631, Mesquite's substitution of the new ordinance has not "completely and irrevocably eradicated the effects of the alleged violation." In the past the vagueness of the phrase "connections with criminal elements," aggravated by Mesquite's unwarranted animosity toward Aladdin's, resulted in denial of a license to Aladdin's until a court intervened. There are indications that the new ordinance, No. 1410 (see App.), is intended to incorporate *sub silentio* the impermissibly vague standards of the old. Thus the code words "criminal elements" appear in the statement of purpose. (Section 10.) The complex and burdensome disclosure requirements for applicants (arrests, fingerprints, past licensing history, etc., sections 6(5)(f), (g), (h)), the results of which are to be the basis for the chief of police's annual determination of suitability for licensing, appear calculated to perpetuate the vague standard of the former ordinance.

Accordingly, this case satisfies neither of the requisites of mootness. There exists a reasonable likelihood that Mesquite will reenact the objectionable provision if it is permitted to avoid the binding effect of the judgments below; and there remain lingering effects of the phrase "connections with criminal elements" in the new ordinance. The Court should therefore reach the merits of the vagueness claim.

B. The Phrase "Connections With Criminal Elements," Even With Its Accompanying Definition, Is So Imprecise And Capable Of Varying Interpretation As To Be Void For Vagueness.

Due process prohibits laws so vague that persons "of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Smith* v.

Goguen, 415 U.S. 566, 572 n.8 (1974). Vague laws—be they civil or criminal, *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925)—offend due process in three related ways: they fail to afford persons "a reasonable opportunity to know what is prohibited, so that [they] may act accordingly"; they fail to provide "explicit standards for those who apply them," and thus invite arbitrary and discriminatory enforcement; and they operate "to inhibit the exercise of . . . protected freedoms . . . [by] inevitably lead[ing] citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). All three consequences flow from the Mesquite ordinance directive that the chief of police consider an applicant's "connections with criminal elements" in evaluating license applications.

Mesquite does not contend that the phrase "connections with criminal elements," standing alone, can withstand a due process[26] challenge. Mesquite's contention is that the definition of "connections with criminal elements" contained in the ordinance[27] imbues this phrase with sufficient clarity to satisfy the requirements of due process. This

---

[26] Nor could Mesquite so contend in view of the final judgment of the state court adjudicating that issue. *City of Mesquite v. Aladdin's Castle, Inc.*, 559 S.W.2d 92, 94 (Tex. Civ. App. 1977), *aff'd on other grounds*, 570 S.W.2d 377, 378 (Tex. 1978).

[27] That definition reads as follows (J.A. 84-85):

> *Connection With Criminal Elements* is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as a parent, subsidiary or affiliate, has such association, acquaint-

(footnote continued)

definition, however, rather than clarifying "connections with criminal elements," serves only to underscore its impermissible vagueness.[28]

To begin with, the definition's reference to involvement in "unlawful activities, whether convicted or not," is impermissibly vague. The definition nowhere specifies what, other than a conviction, is sufficient to establish the existence of unlawful activities or involvement therein.

Moreover, the ordinance is silent as to what types of "association, acquaintance, or business association" are sufficient to brand an applicant as being connected with "criminal elements." An applicant cannot determine in advance what kinds of relationships are covered by the ordinance.

(footnote continued)

> ance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities, whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procurring [sic] of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from such unwholesome influences are rendered more difficult.
>
> A determination by the United States Department of Justice that a party is a member of the 'mafia' or 'Cosa Nostra' family or that such party is engaged in or affiliated with a nationwide crime organization, whether formally or informally, shall be prima facie evidence, so far as the issuance of a license hereunder that such person has 'connections with criminal elements' and constitute, within the meaning of this ordinance, "criminal elements."

[28] Contrary to Mesquite's assertion (Appnt's Br. 32) that the ordinance definition did not provide a "basis of the court below's decision," both the District Court and the Court of Appeals considered this definition and still found the ordinance unduly vague. 434 F. Supp at 475-76; 630 F. 2d at 1037-1038.

This Court has held that legislatures may not impute to individuals the illegal purposes held by those with whom they associate; rather, there must be inquiry into whether the individuals know of these illegal purposes and share a specific intent to promote them. *Cole* v. *Richardson*, 405 U.S. 676, 680 (1972); *Elfbrandt* v. *Russell*, 384 U.S. 11, 17 (1966). To do otherwise would threaten "the cherished freedom of association protected by the First Amendment." *Id.* at 18. Under this ordinance, however, there is no assurance that Mesquite may not deny licenses on the impermissible basis of guilt by association.

The definition compounds its vagueness by providing that a connection with criminal elements is established "to the extent" that the ill-defined associational relationships, described above, render certain crimes "more feasible or likely," or the protection of youth from unsavory influences "more difficult." There is no ascertainable standard by which to measure when the commission of designated crimes is "more likely or feasible" or the protection of youth "more difficult." These phrases are devoid of any objective criteria that would ensure their uniform application.[29] The ordinance confers upon Mesquite officials the

---

[29] For this reason, the instant case is distinguishable from *Grayned* v. *City of Rockford*, 408 U.S. at 108, wherein the Court upheld against a vagueness challenge an ordinance prohibiting the "making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." The Court noted that it was "apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted," which is "easily measured by [the] impact on the normal activities of the school." *Id.* at 112. Mesquite's ordinance provides no similar discernible objective guidance. Moreover, in *Grayned* the vagueness that otherwise would have inhered in the phrase "tend to disturb" was eliminated by a state supreme court interpretation. *Id.* at 111-12. There is no similar saving state interpretation of the Mesquite ordinance.

discretion to define these terms differently from case to case, and thus denies applicants the ability to order their conduct so as to qualify for licensing.

The final vice of the definition lies in the weight it accords to Justice Department determinations that a party is involved in organized crime. It is unclear whether the words "formally or informally" modify "affiliated with a nationwide crime organization" or "determination by the United States Department of Justice." In either event, the modifier compounds the vagueness of the modified phrase. *Cf. Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939) (defining "gangster" in part as one who is "known to be a member of any gang" held impermissibly vague).

Mesquite urges several arguments in support of the ordinance. It begins by attacking the standing of Aladdin's to challenge this portion of the ordinance. (Appnt's Br. 32-35.) Mesquite argues that since Aladdin's was not seeking a license at the time suit was filed, there was and is no case or controversy. As the Court of Appeals correctly observed, however, the ordinance requires licensees to seek annual renewal of their licenses, and application of the challenged phrase "connections with criminal elements" might prevent Aladdin's from securing a license on renewal, causing it to suffer "substantial pecuniary loss." 630 F.2d at 1036.

Contrary to Mesquite's contention, the state court judgment declaring unconstitutional a prior version of the ordinance that contained the phrase "connections with criminal elements" without definition, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 559 S.W.2d 92, 94 (Tex. Civ. App. 1977), does not preclude Mesquite from enforcing the ordinance here at issue. Significantly, Mesquite never has conceded that it lacks power to enforce Ordinance No. 1353 against Aladdin's.

Mesquite also argues that Aladdin's lacks standing to attack the ordinance provision because, as in *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972), the provision mandates only the collection of information. Here, however, the vaguely defined information that is to be gathered has an effect on licensing decisions. The City Manager and the City Council may base their disapproval upon an adverse recommendation of the chief of police as to the applicant's character, which in turn may be based upon the chief's determination as to "connections with criminal elements." (J.A. 82-83.) The chief of police's recommendation can thus prevent issuance of the license, as it did in this case, or renewal of the license.[30]

Mesquite's contentions on the merits are also without merit. The proposition that post-licensing judicial review is sufficient to correct any vagueness in the ordinance (Appnt's Br. 34) has been soundly rejected by the Court. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 685 (1968); *Bouie* v. *City of Columbia*, 378 U.S. 347, 352-53 (1964). Mesquite also asserts that the language is "precise enough so that those charged with the responsibility of review would know what standards to apply." (Appnt's Br. 36.) Due process requires, however, that those who are regulated be able to understand the standard, and that the words be clear to persons "of common intelligence." *Smith* v. *Goguen*, 415 U.S. at 572 n.8.

---

[30] It is specious to argue, as does Mesquite, that "connections with criminal elements" cannot be determinative in the licensing process merely because the ultimate inquiry is into an applicant's good character. Section 6 of the ordinance states that in making his determination of an applicant's good character, the chief of police "shall consider . . . connections with criminal elements." (J.A. 82.) Therefore, good character may be determined solely by reference to "connections with criminal elements." Indeed, it is clear from the record in this case that Mesquite's licensing decision was based solely on perceived "connections with criminal elements." (J.A. 32-33.)

Accordingly, the phrase in Mesquite Ordinance No. 1353 "connections with criminal elements" and the definition of that phrase in the ordinance are impermissibly vague, as the Court of Appeals and the District Court correctly held.

C. Even If The Court Deems The Vagueness Issue Moot, The Judgment Should Be Left Intact As To That Issue.

This Court's usual procedure when a case is held moot is to vacate the judgment below and to remand the case to the district court with instructions to dismiss. *Board of Regents* v. *New Left Education Project*, 414 U.S. 807, 807 (1973); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 and n.2 (1950). When this occurs, the lower court decisions are stripped of their precedential effect, *County of Los Angeles*, 440 U.S. at 634 n.6, "clear[ing] the path for future relitigation of the issues between the parties and eliminat[ing] a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

Although this course of action is required of the intermediate courts of appeals, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93-94 (1979), the same does not hold true for this Court, as the *Munsingwear* case recognized by allowing the judgment of the lower court to stand. As stated in *Munsingwear*, the reason for eliminating the precedential effect of moot cases is to allow relitigation of the issues where review was prevented by "happenstance." If this case is moot, review is prevented, not by happenstance, but by planned, deliberate actions of Mesquite in adopting a new ordinance while appealing the decision invalidating the old. If Mesquite simply had elected not to appeal the District Court judgment, that judgment would stand as a binding precedent prohibiting use of the "connections with criminal elements" standard. Mesquite should not be able, by unilateral action, to avoid the effect of the judgment by filing an appeal and then voluntarily taking

action that results in vacating the judgment. Therefore, if this Court rules that the challenge to the phrase "connections with criminal elements" is moot, the District Court judgment should be allowed to stand as to this issue.

CONCLUSION

As to the age restriction claim, this Court should dismiss the appeal and, treating the jurisdictional statement as a petition for certiorari, deny certiorari. If the Court exercises its certiorari jurisdiction to reach the merits, it should affirm on the basis of adequate independent state law grounds supporting the judgment or, if it reaches the federal issues, affirm on the ground that the age restriction is invalid under the First and Fourteenth Amendments.

As to the vagueness claim, the Court should hold the case is not moot and affirm. If it deems the case moot, it should allow the judgment as to this issue to stand.

Respectfully submitted,

PHILIP W. TONE
One IBM Plaza
Suite 4500
Chicago, Illinois
(312) 222-9350

LOUIS P. BICKEL
THOMAS L. CASE
5441 First International Bldg.
Dallas, Texas 75270
(214) 651-8545

DON R. SAMPEN
CHRISTOPHER L. VARNER
SIDNEY I. SCHENKIER
RICHARD P. STEINKEN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Dated: September 1, 1981

APPENDIX

APPENDIX

ORDINANCE NO. 1410

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, REPEALING ORDINANCE NUMBER 1353 OF THE CITY OF MESQUITE AND AMENDING CHAPTER 5B, MESQUITE CITY CODE, BY PROVIDING REGULATION OF AND ESTABLISHING A LICENSE FEE FOR COIN-OPERATED AMUSEMENT ESTABLISHMENTS; PROHIBITING THE PLAYING OR OPERATION OF COIN-OPERATED AMUSEMENT MACHINES BY PERSONS UNDER SEVENTEEN (17) YEARS; PROVIDING EXCEPTIONS; PROVIDING FOR REVOCATION OF LICENSE; PROVIDING A RIGHT AND MANNER OF APPEAL; PROVIDING CERTAIN DEFINITIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY NOT TO EXCEED TWO HUNDRED DOLLARS ($200.00) FOR EACH OFFENSE; AND DECLARING AN EMERGENCY.

WHEREAS, coin-operated amusement establishments have a tendency to attract patrons of tender years, and

WHEREAS, the congregation of youthful patrons creates problems of policing due to the need to protect such patrons from the influences of those who would promote gambling, sale of narcotics and other unlawful activities; and

WHEREAS, it is vital to the safety and welfare of the inhabitants of the City of Mesquite and particularly those of tender years for whom a special duty is imposed upon the governing body to protect, that proper and suitable operators only are licensed to operate coin-operated amusement establishments and that such establishments be regulated to that end; and

WHEREAS, it has been determined that the attraction of such establishment for those under seventeen (17) years of age is detrimental to such persons and to the health and welfare of the inhabitants of the City, generally.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That Ordinance Number 1353 of the City of Mesquite passed on the 7th day of February, 1977, is hereby repealed.

SECTION 2. That Chapter 5B, Mesquite City Code is hereby amended to read as follows:

SECTION 3. It is hereby declared to be unlawful to own, display or operate coin-operated amusement machines or apparatus in the City without a license issued by the City of Mesquite therefor.

SECTION 4. It is hereby declared to be unlawful to own, operate or maintain a coin-operated amusement establishment in the City without a license issued by the City of Mesquite therefor.

SECTION 5. It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines or coin-operated amusement establishments to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

SECTION 6. *License*: Any person desiring to obtain a license for a coin-operated amusement machine may apply to the Assessor-Collector of Taxes of the City of Mesquite

on a form to be furnished by the City showing the type of machine to be licensed, serial number, location, name of establishment and name of the owner or person in control of such machine together with the name and title of person making the application if other than the owner.

Upon payment of the license fee, the Assessor-Collector shall issue a license which shall be valid for such machine for one (1) year.

Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review. The applicant shall accompany the application with a tender of the correct permit fee as hereinafter provided and shall, in addition, furnish the following:

(1) The type of ownership of the business, i.e., whether individual, partnership, corporation, or otherwise;

(2) The name under which the business is to be conducted;

(3) The business address and all telephone numbers where the business is to be conducted;

(4) The name and residence address of the manager or other person principally in charge of the operation of the business;

(5) The following personal information concerning the applicant, if an individual; and concerning each stockholder holding more than ten (10) per cent of the stock of the corporation, each officer and each director, if the applicant is a corporation; and concerning the partners, including limited partners, if

the applicant is a partnership; and the holder of any lien, of any nature, upon the business and/or the equipment used therein; and concerning the manager or other person principally in charge of the operation of the business:

(a) Name, complete residence address and residence telephone numbers,

(b) The two (2) previous addresses immediately prior to the present address of the applicant,

(c) Written proof of age,

(d) Height, weight, color of hair and eyes, and sex,

(e) Two (2) front-face portrait photographs taken within thirty (30) days of the date of the application and at least two (2) by two (2) inches in size.

(f) The coin-operated amusement or similar business history and experience ten (10) years prior to the date of application, including but not limited to whether or not such person in previously operating in this or another city or state under license or permit has had such license or permit denied, revoked, or suspended and the reason therefor, and the business activities or occupations subsequent to such action of denial, suspension or revocation,

(g) All criminal arrests other than misdemeanor traffic violations, fully disclosing the jurisdiction in which arrested and the offense for which arrested and the disposition thereof.

(h) A complete set of fingerprints taken and to be retained on file by the police chief or his authorized representatives;

(6) Such other information, identification, and physical examination of the person as shall be deemed necessary by the police chief to discover the truth of the matters hereinbefore required to be set forth in the application;

(7) Authorization for the city, its agents and employees to seek information and conduct an investigation into the truth of the statements set forth in the application and the qualifications of the applicant for the permit;

(8) The names and addresses of three (3) adult residents of the county who will serve as character of references. These references must be persons other than relatives and business associates.

(9) Written declaration by the applicant, under penalty of perjury, that the foregoing information contained in the application is true and correct, said declaration to be made under oath.

The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude, taking into consideration the attraction by such establishments of those of tender years.

The Chief Building Inspector and City Planner shall determine compliance with applicable building and zoning ordinances of the City.

When the City Manager has received the recommendations from the Chief of Police, Chief Building Inspector and City Planner, he shall review such application together with such recommendations as may be furnished and shall approve such application or disapprove same with written notation of his reasons for disapproval.

Upon approval by the City Manager and payment of the license fee, the City Secretary shall issue a license for such establishment, which shall be valid for one (1) year and shall be non-transferrable.

Upon disapproval, the applicant may make such corrections as noted and request approval, request withdrawal and refund of license fee, or give notice of appeal from the City Manager's decision.

In the event of appeal from the City Manager's decision, the applicant shall give written notice of his intention to appeal within ten (10) days of notice of the City Manager's decision. Such appeal shall be heard by the City Council within thirty (30) days from date of such notice unless a later date is agreed upon by applicant or continuation is necessary to obtain additional information regarding applicant's character.

Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305, V.A.C.S. to show to the Council that he or it is of good character as a law abiding citizen to such extent that a license should be issued. In order to discharge such burden, the applicant may be required by the City Council to furnish such information as may be pertinent and relevant to the determination of applicant's character.

The City Attorney is hereby directed to serve notice upon applicant within ten (10) days from date of notice of appeal as to the nature and extent of information to be furnished to the City Council for

purposes of the hearing on appeal. Notice of the information required may be supplemental before, during, and after the hearing before the City Council. A determination as to relevancy and need for any particular information, in the event of dispute, shall be made by the City Council. The hearing may be continued for the purpose of obtaining additional information should the City Council deem it necessarw to consider such information.

Upon hearing, the City Council may reverse the decision of the City Manager in whole or in part or may affirm such decision.

An applicant may appeal such decision to the District Court within thirty (30) days but such appeal shall be upon the substantial evidence rule.

Evidence to be considered upon appeal must be relevant and convincing but need not be in the form required in a suit originating in the District Court but shall be deemed competent evidence if the Court finds that it is of the type commonly relied upon by reasonably prudent men in the conduct of their affairs.

It is recognized that the administrative agency or the court reviewing the decision thereof, in general, will not be the agency responsible for investigation of unlawful activities of a party for the purpose of bringing prosecution and will not have the responsibility for the prosecution or conviction of a party for a criminal offense. Therefore, the administrative official or body or reviewing court shall not be limited in its consideration of character or conduct as a law abiding person to acts for which conviction has been obtained or upon which charges are pend-

ing, but may consider all evidence tending to prove commission of acts prohibited by law without regard to criminal prosecution. Nor shall an acquital upon a criminal charge, where the burden of proof is different from that required herein, be res judicata of the question to be determined.

Upon the issue of character, all acts and circumstances reasonably tending to prove a lack of good character, particularly in those areas affecting the public interest, considering the age of the patrons of such establishment, such as an obvious disregard for the laws, rules and regulations imposed by law and other facts indicating a lack of commitment to adherence to rules established by law, together with evidence of any special skill or expertise in criminal conduct as defined in Title 18, Section 3735, United States Code; shall be admissible, provided, however, that the administrative officer or body or reviewing court shall be guided by the standards employed by Federal District Courts in their consideration of pre-estence reports in criminal cases as provided in Title 18, Section 3577, United States Code, *Williams* v. *New York*, 337 U.S. 241.

For violation of any of the requirements of this ordinance, the City Manager may, upon three (3) days notice to Licensee, revoke the license granted hereunder. The same rights of appeal shall exist upon revocation as upon disapproval of the original application.

A person licensed hereunder, by acceptance of such license authorizes the City and its designated personnel to make inspections of the premises, facilities, manner of operation and character of any employee.

The holder of a license hereunder shall comply with all ordinances and requirements of the City of Mesquite and all laws of the State of Texas.

SECTION 7. There is hereby levied a license fee of Ten Dollars ($10.00) for each coin-operated amusement machine and a license fee of One Hundred Dollars ($100.00) for each coin-operated amusement establishment in the City.

The license of a coin-operated amusement establishment shall not exempt the owner or operator from the license fee of individual machines or obedience to any other ordinance of the City of Mesquite, including the prohibition of pool halls.

SECTION 8. *Exceptions*: This ordinance shall not apply to any agency of the United States Government, State of Texas or political subdivision thereof.

Any charitable organization operating or displaying such machines in connection with charitable activities on premises exempt from payment of ad valorem taxes under State law because of such charitable activities shall be exempt from the provisions of this ordinance to such extent.

SECTION 9. *Definitions*: For the purpose of this ordinance, the following words and terms are defined as follows:

Coin-Operated Amusement Machine—Means a machine or apparatus that may be played or operated by the insertion of a coin and on which games or tests of skill, chance or ability are played, including pinball machines, and any machine initiating games of sport, shooting, or guiding

objects or any machine designed for amusement or relaxation, but not including machines for vending food, drink and tobacco products, music playing or recording or apparatus commonly known as kiddie rides.

Coin-Operated Amusement Establishment:—Means any business or commercial establishment or other building or location wherein three (3) or more coin-operated amusement machines are displayed.

Character as a law abiding citizen shall mean substantially that standard employed by the Supreme Court of the State of Texas in the licensing of attorneys as set forth in Articles 305 and 306, Vernon's Annotated Civil Statutes but expressly excludes conviction by any parties of traffic violations of a Class C misdemeanor grade.

SECTION 10. *Legislative Policy*: It is the policy of the City of Mesquite, in the enforcement and interpretation of this ordinance, to discourage and prohibit the operation, control or interference in the operation of coin-operated amusement facilities by organized crime.

The attraction by the vending industry in general and amusement facilities in particular of criminal elements of our society is recognized and such is determined to be contrary to the welfare of the inhabitants of the City of Mesquite.

SECTION 11. That should any paragraph, sentence, subdivision, clause phrase, section or provision of this ordinance be adjudged or held to be unconsitutional, illegal or invalid, the same shall not affect the validity of this ordinance as a whole or any part or provision hereof other than the part so decided to be unconstitutional, illegal, or invalid and shall not affect the validity of any other provision of the Code of the City of Mesquite.

SECTION 12. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction in Corporation Court shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) for each offense.

SECTION 13. The fact that the City of Mesquite has no adequate ordinance regulating the operation of coin-operated machines or establishments wherein such machines are located in the City creates an urgency and an emergency and in the preservation of the public health, safety and welfare of its citizens and after its passage and the publication of the caption as the law and charter in such cases provide.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 19th day of December, A.D., 1977.

/s/ *B. J. Smith*
B. J. SMITH
MAYOR

ATTEST:

/s/ *Norma G. McGaughy*
Norma G. McGaughy
City of Secretary

APPROVED AS TO FORM:

.....
Elland Archer
City Attorney